UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ADT LLC	§	
	§	
Employer/Petitioner	§	
	§	
and	§	**Case 16-RM-123509**
	§	
COMMUNICATIONS WORKERS OF AMERICA, LOCAL 6215	§	
	§	
Union	§	

UNION'S RESPONSE TO EMPLOYER'S SUPPLEMENTAL BRIEF

TO THE HONORABLE NATIONAL LABOR RELATIONS BOARD:

The Communications Workers of America, AFL-CIO ("CWA" or "Union"), by and through counsel, herewith submits its response to the supplemental brief the employer, ADT, submitted on May 22, 2015. CWA would respectfully show the following.

I. ADT's Request for Administrative/Judicial Notice is Inappropriate

ADT's request that the National Labor Relations Board ("NLRB" or "the Board") take notice of the filed decertification petition in Case No. 16-RD-152333 is inappropriate because it asks the Board to take notice of facts irrelevant to the validity of the RM petition pending before the Board in this case, and it asks the Board to take notice of facts that have not been established by a finder of fact such as an NLRB hearing officer.

First, the recent filing of a decertification petition on May 15, 2015 is not relevant to the question of whether ADT had sufficient grounds to file the RM petition in Case No. 16-RM-123509. ADT filed the RM petition in Case No. 16-RM-123509 on March 3,

2014. ADT indicated on March 3, 2014 that its sole basis for doubting CWA's continued support was its volitional "integration" of its represented workforce with its unrepresented workforce. (See CWA's Request for Review, Attachments, Exhibit J-2, ADT's March 3, 2014 submission to Region 16, App. 10). The "integration" was not part of an acquisition of or merger with another business, but rather was a different decision occurring nearly four years after ADT's acquisition of Broadview, as demonstrated in the hearing record in the instant case and discussed in CWA's principal brief. (Union's principal brief at p.9)

One of CWA's central contentions on review is that the relocations/reassignments of the unrepresented and represented workforces did not provide ADT with the good faith uncertainty required by the Board for the filing of an RM petition under the standard announced in *Levitz Furniture*, 333 NLRB 717 (2001). ADT's request for judicial notice is nothing more than an effort to supplement *post hoc* its basis for the RM petition by citing to alleged employee nonsupport of the Union occurring over one year later. ADT had no objective actual evidence of employee nonsupport in March of 2014, but seeks to bootstrap the putative lack of support animating the decertification petition in Case No. 16-RD-152333 to justify its filing of an RM Petition over fifteen months ago. The issue for the RM case is whether ADT had good faith uncertainty as to CWA's support on March 3, 2014, not whether CWA holds majority support over a year later on May 15, 2015 when the decertification petition was filled. Accordingly, the Board should decline to take notice of the decertification petition filed in Case No. 16-RD-152333.

Whether or not the decertification petition is meritorious is inapposite as to the merits of the RM petition filled over a year earlier and, in point of fact relevant to the second reason that ADT's request for judicial notice is inappropriate, the merit of the decertification petition has yet to be determined. Region 16 has placed 16-RD-152333 in abeyance pending the outcome of the Board's decision in this proceeding. As such, at this time, if any judicial notice at all is appropriate such notice could go no further than the bare fact that the decertification petition has been filed. The petitioner's allegation that a majority of employees support the decertification petition is no more than a bare allegation. There has been no determination of whether that allegation is accurate and indeed no determination of the appropriate pool of employees for such a calculation, which is an especially cogent question since the employer has consciously and deliberately refused to treat newly hired employees as part of the represented bargaining unit since mid-2014 (Union's principal brief at p.11); and the only appropriate unit for an RD election is the existing recognized unit, *Alan's Department Store*, 131 NLRB 565, 567 n.7 (1961). Judicial notice is appropriate only where the facts asserted are common knowledge or beyond dispute; it is not appropriate when the facts asserted cannot be readily ascertained or are subject to dispute. *Casino Pauma*, 362 NLRB No. 52, **3-4 (2015).

Contrary to the assertion of ADT in its Supplemental Brief, whether a majority of employees support the decertification petition cannot be determined at this point because not only has there been no vote by the bargaining unit employees, a legitimate measure of employee support through an election cannot be taken at this time because

of ADT's unlawful conduct that is the subject of numerous pending NLRB charges. Case No. 16-CA-144548, filed on January 15, 2015 by the Union and amended on February 5, 2015, alleges that ADT has unlawfully altered the scope of the bargaining unit by depriving newly hired production employees of the benefits of the labor agreement so as alienate those employees from the Union for the unlawful purpose of undermining support for CWA and making the Union appear weak and ineffective. Case No. 16-CA-152951, filed on May 22, 2015 by the Union, contends that ADT unlawfully supported the filing of the decertification petition at issue in Case No. 16-RD-152333. Cases 16-CA 152152 and 16-CA-153280, filed by the Union on May 12 and May 27, 2015, allege that ADT has engaged in bad faith bargaining with CWA by refusing to provide information, refusing to meet at reasonable times, placing unlawful preconditions on the bargaining, and failing to properly compensate employees for their time bargaining. CWA requests that should the Board take administrative notice of Case No. 16-RD-152333, it should also take notice of cases 16-CA-144548, 16-CA-152152, 16-CA-152951, and 16-CA-153280 for the proposition that the facts ADT wishes the Board to take notice of lack the certainty and clarity sufficient to be the subjects of administrative or judicial notice.

II. Dismissing the RM Petition Would Send the Correct Message to Employers

ADT segues from its request for administrative/judicial notice of the RD petition to rearguing the merits of its case. ADT argues that the wrong message would be sent by dismissing this RM petition because the company allegedly attempted to follow the rule of *Levitz Furniture* because it did not withdraw recognition, but rather filed an RM

petition. CWA's point throughout this proceeding has been that the facts relied upon by ADT to file the RM petition on March 3, 2014 did not rise to the level of providing ADT with the good faith uncertainty necessary for filing an RM petition. Under *Levitz Furniture Company* to withdraw recognition requires proof of lack of majority support; and to file an RM petition requires good faith uncertainty based on evidence of employee disaffection. While the *Levitz Furniture* standard for filing an RM petition does not require proof of lack of majority support as does the standard for withdrawing recognition, it still requires good faith uncertainty based on evidence of employee nonsupport. Mere supposition or assumption will not do.

In adopting the good faith uncertainty standard in *Levitz Furniture*, the Board categorically rejected the proposition that there need not be any evidence of loss of a union's support to justify the filing of an RM petition. *Levitz*, 333 NLRB at 728. In *Levitz Furniture*, by way of its application of the United States Supreme Court decision in *Allentown Mack Sales & Service v. NLRB,* 522 U.S. 359 (1998), the Board held that a significant number of bargaining unit employees expressing dissatisfaction with the union, a statement by a bargaining unit employee that an entire shift opposed the union, or a steward stating a majority of unit employees did not support the union and that a vote would result in the union's defeat provided an employer with good faith uncertainty. *Levitz Furniture* at 728-29. ADT's proffered reasons for filing the RM petition in its March 3, 2014 submission to Region 16, (see CWA's Request for Review, Attachments, Exhibit J-2, ADT's March 3, 2014 submission to Region 16, App. 10), do not even remotely approach this standard. The closest analogy one could make to the

mathematical calculation submitted by ADT are facts that the Board in *Levitz Furniture* held did not meet good faith uncertainty:

> "…newly hired employees' failure to join the union, some employees' failure to authorize dues checkoff, and the union's failure to file grievances (absent knowledge of the employer's breaches of contract), appoint a steward, or submit a tentative agreement to the employees for ratification--were insufficient to engender a good-faith uncertainty." *Levitz* at 729 (citing *Henry Bierce Co.*, 328 NLRB 646, 647 (1999)).

The distinction made by the Board here is significant: an employer must have some evidence of employee dissatisfaction to file an RM petition, and statistical assumptions extrapolated from facts that do not prove lack of support for Union representation are not sufficient. Here, the bare assumption that all former Broadview employees did not support Union representation merely because they were not previously represented is no different than a bare assumption that newly hired employees into a bargaining unit do not support Union representation merely because they were not previously represented, which is an assumption the Board has plainly held cannot be made. Moreover, in point of relevance to CWA's request for administrative/judicial notice of Case No. 16-CA-144548, the latter charge alleges that ADT created some of the very circumstances and context pertaining to the RM petition. As the Board found in *Henry Bierce* and as noted by the Board in *Levitz Furniture* in its discussion of *Henry Bierce*, 328 NLRB 646 (1999), "some of the factors relied on by the employer were the direct result of its own unlawful failure to apply the union contract to new employees or to inform the union about new hires." *Levitz Furniture* at 729, n. 63 (citing *Henry Bierce*, 328 NLRB at 647). The issue in Case No. 16-CA-144548 is that ADT unlawfully failed to apply the terms of the agreement to new hires and excluded

those employees from the bargaining unit. In turn the employer-created exclusion of these employees from the unit and from coverage of the existent collective bargaining agreement became part of the critical surrounding circumstances pertinent to the RM proceeding.

Permitting this RM case to proceed would nullify the good faith uncertainty required by *Levitz Furniture* because it would authorize the filing of RM petitions absent actual evidence of employee dissent. Allowing this RM proceeding to go forward would reduce to a pretext the good faith uncertainty required by *Levitz Furniture* and force unions to face potential annual challenges through RM petitions so long as the employers could articulate any purported reason for uncertainty. Dismissing this RM petition, however, would reaffirm the principle of good faith uncertainty articulated in *Levitz Furniture* and reiterate for employers that some evidence of employee dissatisfaction is necessary to legitimize an RM petition. This is the correct message for employers. But encouraging the anarchy that will result should the Board permit the filing of RM petitions based on a self-created statistical analysis grounded on the employer's unilateral relocations of employees within the employer's facilities is not the right message; such a result would send an inappropriate message to employers that the law permits them to manufacture circumstances permitting RM petitions by simply relocating or reassigning employees in order to create the desired numerical profile to justify filing a petition. It would be a type of result the Board appropriately sought to prevent in *Levitz Furniture* as well as earlier in *Harte & Company*, 278 NLRB 947 (1986). Permitting employers to so easily bootstrap themselves into filing RM petitions

and thus force unions as frequently as once a year to justify their recognition in the absence of actual evidence of employee nonsupport would make a mockery of industrial or contractual stability and drastically interfere with the purposes of the Act.

III. Suggestion Re-urged to Overrule Decisions that are Inconsistent with Levitz Furniture

The Union re-urges the suggestion, previously presented in its principal brief, that to any extent the Board's decision in *Nott and Company,* 345 NLRB 396 (2005), and/or any similar decisions, may appear to support the employer's position in application to the facts of this case, the Board should overrule such decisions as inconsistent with its decision in *Levitz Furniture Company*, in which it deeply and exhaustively considered the issues before it in order to harmonize Board law with decisions of the United States Supreme Court.

IV. All Other Arguments Re-urged

CWA re-urges all other contentions and arguments previously presented in its principal brief.

Respectfully submitted,

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Certificate of Service

This is to certify that the above and foregoing Union's Brief in Response to Employer's Supplemental Brief was served on ADT LLC and the Regional Director, NLRB Region 16, by electronic delivery to the below indicated counsel of record for ADT and Martha Kinard, Regional Director, on the 5th day of June, 2015:

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